No. 76-89

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHEL JOSEPH NAPOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-4A) is reported at 530 F. 2d 1198. The opinion of the district court (Pet. App. 5A-17A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1976, and a petition for rehearing with suggestion of rehearing *en banc* was denied on June 24, 1976. The petition for a writ of certiorari was filed on July 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a warrant authorizing the search of a first class airmail parcel was defective because of an unintentional omission of fact from the supporting affidavit or

because of inclusion in the affidavit of historical and biographical information obtained from petitioner at the time of an allegedly illegal state arrest.

2. Whether the search of petitioner's camper bus was lawful.

STATEMENT

After a non-jury trial on stipulated facts in the United States District Court for the Eastern District of Louisiana, petitioner was convicted of possession of lysergic acid diethylamide (LSD) with intent to distribute it, and of conspiracy and use of the mails to commit that offense, in violation of 18 U.S.C. 2 and 21 U.S.C. 841(a)(1), 843(b) and 846. He was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.*, to treatment and supervision until discharged by the Board of Parole pursuant to 18 U.S.C. 5017(c). The court of appeals affirmed (Pet. App. 1A-4A).

As summarized by the court of appeals (Pet. App. 2A), the evidence showed that in April 1974 agents of the Drug Enforcement Administration obtained a search warrant for a first class mail parcel addressed to "Michael Joseph, 3027 Napoleon Avenue, New Orleans, Louisiana 70125." Upon opening the package at the post office, the agents discovered LSD, removed part of the contents, and dusted the inside of the parcel with fluorescent powder before resealing it. The agents then arranged for a controlled postal delivery of the package to the address on Napoleon Avenue. As the package was placed in the mailbox, surveilling officers notified an agent waiting in the office of a United States Magistrate. The agent then completed a previously prepared application for a warrant to search the premises of 3027 Napoleon Avenue and presented it to the magistrate. Agents waiting near the residence were informed as soon as the warrant had been issued.

Petitioner and his girl friend were on the porch at 3027 Napoleon Avenue when the postman placed the parcel in the mailbox. The girl walked to the mailbox, after which she and petitioner descended the stairs, passed from view, and proceeded along the driveway toward the back of the house. Approximately five minutes later, the agents approached the house to execute the warrant. Petitioner was observed padlocking the door of a camper bus parked in the driveway and was immediately arrested. Keys to the padlock and traces of fluorescent powder were found in the incidental search of his person. When the agents were unable to find the package or the LSD in the house or yard after two hours of searching, they conducted a thorough search of the camper bus and found the LSD in a secret compartment.

ARGUMENT

1. Petitioner challenges the validity of the warrant authorizing the postal search on two separate grounds, neither of which has merit.

a. Petitioner claims (Pet. 10-26) that the search warrant was invalid because of an omission of fact in the supporting affidavit. The affidavit submitted in support of the warrant was based upon the first-hand knowledge of an undercover D.E.A. agent, Earl Riley, who had purchased LSD from Gary White. White had told Agent Riley that his source received his LSD by mail. In addition, the affidavit related that on April 23, 1974, White had been observed visiting a shop operated by petitioner, after which White informed Agent Riley that a large shipment of LSD would take place through the mails within two days. On April 24, Agent Riley was present during a phone conversation between White and petitioner in which the delivery was again discussed and confirmed. Furthermore, a postal watch initiated on April 25, 1974, turned up a package

addressed to "Michael Joseph," which was a known alias of petitioner. The return address on the package was determined by postal authorities to be fictitious. Finally, the affidavit stated that informants had reported the presence of LSD at petitioner's address (Pet. App. 14A-15A).

On the basis of the above information, a United States Magistrate issued a warrant for the search of the package. Although petitioner does not dispute that the facts set forth in the affidavit were sufficient to establish probable cause for the warrant, he claims that the affidavit failed to state that, prior to issuance of the warrant, White had told Agent Riley "[t]he deal is off" (Pet. App. 13a); that this information had been intentionally omitted from the search warrant affidavit; and that the omission constituted a material misrepresentation that, if known to the magistrate, would have precluded a finding of probable cause.

As the district court noted (Pet. App. 13A), however, this omission was not material in light of the substantial other accurate information in the warrant application, especially the fact that a package addressed to an alias used by petitioner had been discovered in the mails at approximately the time that White had indicated there would be a postal shipment of LSD. "Each link of the method and proposed date of delivery," the court remarked, was "confirmed before applying for the warrant. White's last minute recall of delivery does not destroy probable cause." Moreover, the district court found that the omission had been unintentional (Pet. App. 15A).

Although, as petitioner indicates (Pet. 11-21), the courts of appeals have articulated different approaches, in form if not in substance, to the problem of false statements (or omissions) in search warrant affidavits, no court has

held a warrant invalid where, as here, the alleged defect in the supporting affidavit was both immaterial and unintentional.[1] In these circumstances, the lower courts' finding that there was probable cause for the issuance of the postal search warrant does not merit further review.

b. Petitioner also contends (Pet. 26-32) that the affidavit supporting the postal search warrant was tainted because it contained "historical and biographical information" obtained as a result of an allegedly illegal state arrest. In April 1973, petitioner was arrested by state police officers for possession of drugs. During the administrative booking procedure at the station house, petitioner voluntarily gave 3027 Napoleon Avenue as his mother's address (Pet. App. 6A-7A). Subsequently, petitioner's motion to suppress evidence discovered in a search occurring at the time of the arrest was granted without explanation by the state court, and the drug charges were dismissed by the State.

The court of appeals properly rejected petitioner's claim that the search warrant affidavit was fatally tainted by the earlier arrest. First, as the district court noted (Pet. App. 7A), petitioner's state arrest was never declared illegal and, indeed, it is unclear from the record why the evidence uncovered in the search was suppressed. Petitioner therefore failed to meet his burden of establishing the primary illegality of the method by which the address used in the affidavit was obtained. See *Nardone* v. *United*

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[1]We have recently discussed the apparent differences among the circuits in our Brief in Opposition in *Lee* v. *United States*, No. 75-6969, a copy of which is being provided to petitioner. The primary focus of the courts of appeals has been on affirmative misrepresentations of fact rather than, as here, an omission. See *United States* v. *Park*, 531 F. 2d 754, 759 (C.A. 5); *United States* v. *Armocida*, 515 F. 2d 29, 41 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858.

States, 308 U.S. 338, 341.[2] Moreover, the allegedly "tainted" information in the affidavit—that the Napoleon Avenue address was the residence of Napoli's mother—was recorded not only in D.E.A. files but also in the New Orleans telephone and city directories, which were "independent sources free of any possible taint" (Pet. App. 3A). See *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392.[3]

2. Petitioner contends (Pet. 32-36) that the search of the camper bus was unlawful since it was beyond the scope of the second warrant, which recited (Pet. App. 2A; brackets in original):

> Affidavit having been made before me by Special Agent Raymond Egan Jr. that he [has reason to believe] t[illegible] [on the premises known as] 3027 Napoleon Avenue, New Orleans, Louisiana, being a large, multiple-story, wooden-frame residential dwelling, in the Eastern District of Louisiana there is now being

[2]Application of the exclusionary rule in the federal courts is a question of federal law that must be judged by federal standards. *Ker* v. *California,* 374 U.S. 23, 31-32; *Elkins* v. *United States,* 364 U.S. 206, 224; *United States* v. *Ransom,* 515 F. 2d 885, 889 (C.A. 5), certiorari denied, 424 U.S. 944; *United States* v. *Keen,* 508 F. 2d 986, 988-989 (C.A. 9), certiorari denied, 421 U.S. 929. For the reasons set forth by the district court (Pet. App. 9A-11A), even if petitioner's state arrest had been illegal, no reasons consistent with the purposes of the exclusionary rule would have justified its application here. See *United States* v. *Janis,* No. 74-958, decided July 6, 1976, slip op. 16-17, 20-21.

[3]*Davis* v. *Mississippi,* 394 U.S. 721, on which petitioner primarily relies (Pet. 26-28), is inapposite. There, the Court held inadmissible a defendant's fingerprints, taken at the time of his illegal arrest, that were the primary incriminating evidence against him *at trial.* Not only did the Court hold that the arrest in *Davis* was clearly illegal, but also there was no independent source for the fingerprint evidence. Furthermore, the information obtained in this case was freely and voluntarily given by petitioner at the time of his arrest.

> concealed certain property, namely Lysergic Acid Diethylamide or its derivatives (etc.) * * * and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the [premises] above described and that the foregoing grounds for application for issuance of the search warrant exist.

A warrant is sufficient if "the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended [to be searched]." *Steele* v. *United States,* 267 U.S. 498, 503. As the court of appeals observed (Pet. App. 3A):

> There can be little, if any, doubt that the intent of the officers in this instance was to seize the controlled package and its contents wherever they might be on the premises at 3027 Napoleon Avenue, whether when taken from the mailbox they were carried inside the house, retained on the front porch, carried down the steps to the sidewalk, taken to the yard, or removed to an outbuilding or to a vehicle on the premises.

The court therefore correctly concluded (Pet. App. 3A) that, given a commonsense interpretation and under the circumstances of this case (see *United States* v. *Ventresca,* 380 U.S. 102, 108), the warrant's "reference to 'on the premises known as 3027 Napoleon Avenue' was sufficient to embrace the vehicle parked in the driveway on those premises." See *Brooks* v. *United States,* 416 F. 2d 1044, 1050 (C.A. 5), certiorari denied *sub nom. Nipp* v. *United States,* 400 U.S. 840. Contrary to petitioner's suggestion (Pet. 32), the description of the dwelling in the warrant does not compel a contrary finding. See *Fine* v. *United States,* 207 F. 2d 324, 325 (C.A. 6), certiorari denied, 346 U.S. 923 (shed in yard behind house). See also

United States v. *Bedford,* 519 F. 2d 650, 655, n. 7 (C.A. 3), certiorari denied, 423 U.S. 917; *United States* v. *Anderson,* 485 F. 2d 239, 240 (C.A. 5), certiorari denied, 415 U.S. 958 (flower bed outside house); *United States* v. *Long,* 449 F. 2d 288, 294 (C.A. 8), certiorari denied, 405 U.S. 974 (trash barrel outside building).

In any event, even assuming that the search of the camper bus was not expressly or impliedly authorized by the warrant, it was justified by the existence of probable cause to believe that the vehicle contained the contraband. The agents' knowledge that LSD had just been delivered to the premises, their inability to find the drug in the house or on petitioner despite a thorough search, and their observance of petitioner's padlocking the camper bus after the delivery and prior to his arrest gave the agents reason to believe that the LSD had been placed in the camper. Since the only alternative to an immediate search of the vehicle "was for the agents to immobilize the camper while a warrant was obtained" (Pet. App. 17A), either course was reasonable under the Fourth Amendment. *Chambers* v. *Maroney,* 399 U.S. 42, 52.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1976.

DOJ-1976-10